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Prescription and Title to Moveable Property

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The authors outline the main recommendations in the recent Scottish Law Commission Report on Prescription and Title to Moveable Property.

The law of prescription provides for the creation and extinction of rights and obligations through the passage of time. It is principally contained in the Prescription and Limitation (Scotland) Act 1973. This deals with a wide range of rights and obligations – for example positive prescription of landownership under section 1, of servitudes and public rights of way under section 3 and negative prescription generally under sections 6 to 8. But, one area with which the 1973 Act does not expressly regulate is positive prescription of ownership of corporeal moveable property. To remedy this, the Scottish Law Commission has recently completed a review of this area of law, culminating in the publication of its Report and draft Bill on Prescription and Title to Moveable Property (Scot Law Com No 228, 2012, available at <http://www.scotlawcom.gov.uk/>). The Report, which following usual Commission practice has a draft Bill, makes recommendations for the introduction of new rules here.

History

This project, although very recently completed, has its origins in the 1970s. Following the passage of the 1973 Act it was the Commission's intention to review the law of positive prescription relating specifically to corporeal moveable property. A consultation paper was published entitled *Corporeal Moveables: Usucapion or Acquisitive Prescription* (Memorandum No 30, 1976). No follow-up report was, however, published. Then, after a gap of more than thirty years, it was agreed with the Scottish Government that the subject would be revisited in the Commission's Eighth Programme of Law Reform (Scot Law Com No 220, 2010). A Discussion Paper (Scot Law Com Discussion Paper No 144, 2010) was published and this was followed by consultation. The Report and draft Bill were published in May 2012.

The existing law

As mentioned, the 1973 Act does not expressly deal with prescription of corporeal moveable property. It does contain rules on *negative* prescription of property rights generally. Section 8 provides that a property right will become extinguished if unenforced for twenty years. Although the provision has never been tested through litigation, there is an academic consensus that it applies to ownership of corporeal moveables. See eg D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005) para 7.05. So, if a piece of corporeal moveable property is not possessed for twenty years then the previous owner's right of ownership disappears. But what is the practical effect of this? In Scots law ownerless property falls to the Crown under the common law rule *quod nullius est fit domini regis* (what belongs to no-one becomes the property of the lord king). Thus the only rule of prescription contained in the 1973 Act relating to ownership of corporeal moveable property is a twenty-year rule of negative prescription which actually operates as a rule of positive prescription in favour of the Crown. This is unsatisfactory.

There is some common law authority to suggest that a forty year period of *positive* prescription exists in Scots law for corporeal moveable property. See in particular *Parishioners of Aberscherder v Parish of Gemrie* (1633) Mor 10972. The authority is, however, slight, doubtful and certainly not sufficient upon which to base a modern doctrine of law. See further A R C Simpson, "Positive Prescription of Moveables in Scots Law" (2009) 13 EdinLR 445.

The Commission's recommendations

In its Report the Commission proposes two main rules. The first is a rule of positive prescription which operates to give the possessor of corporeal moveable property title to that property if he or she possesses it for twenty years in good faith and without negligence. The second rule applies to corporeal moveable property which has been lent or deposited, but where the owner can no longer be traced. Under the current law the holder can never become owner of that property. The Commission proposes that ownership can be acquired if the holder has had the property for fifty years and has used reasonable diligence to attempt to contact the owner and not been able to do so. The Commission also makes a number of other recommendations, discussed below.

Rule 1: 20 year positive prescription

The Commission's principal recommendation, contained in section 1 of the draft bill, is a new rule of positive prescription relating to corporeal moveable property. The effect is that if Albert possesses a clock for twenty years in good faith and without negligence (as well as peaceably and without judicial interruption) then he will become the owner upon the expiry of that period. The 'good faith' requirement is subjective and requires him to believe that he is the owner of the corporeal moveable. The 'without negligence' requirement is objective. It is, in effect, a requirement of due diligence which will vary depending on the importance and value of the corporeal moveable in question. For example, for an ordinary alarm clock the due diligence that Albert would have to carry out would be limited. However, for an expensive grandfather clock it would be higher. Questions should be asked of the seller. In the case of a valuable painting checking the Art Loss Register would be good evidence of satisfying the due diligence requirement. The good faith and without negligence requirements must be satisfied throughout the entire twenty year period for positive prescription to run. The policy here is to protect the original owners and set the threshold for the new rule to be satisfied at an appropriate level to do this.

The Commission also recommends that successors can benefit from the rule. This mirrors the position for the positive prescription of landownership. Thus, in the above example, if Albert possesses the clock (in good faith and without negligence) for five years before giving it to Bridget then, provided that Bridget satisfies the various requirements, she will only have to possess the clock herself for fifteen years before positive prescription can operate.

Some of the Commission's consultees were of the view that a twenty year period might be too long to be of any practical use. It is admittedly longer than the periods required in many other jurisdictions (for example in England and Wales the practical equivalent is six years under the Limitation Act 1980 s 3). The Commission's recommendations are, however, aimed at achieving a balance between various competing interests - certainty of title for possessors; recognition of the rights of owners; and protection of 'cultural objects'. In particular, it is important to ensure that title to cultural objects cannot be acquired too easily by way of positive prescription. Some legal systems have separate rules for this type of property. The Draft Common Frame of Reference Book VIII (- 4:101 and 4:102) takes such an approach. It seemed, however, to the Commission to be near impossible to come up with a satisfactory

definition of ‘cultural objects’. A number of its consultees criticised the definition which the Draft Common Frame of Reference uses. The Commission’s conclusion was to avoid such difficulties by recommending a standard but relatively long period.

Rule 2: 50 years of holding deposited or lent property

The second rule, contained in section 2 of the draft bill, applies to corporeal moveable property which has been lent to or deposited with another person but where the original owner can no longer be traced. Where such property has been held for at least fifty years, the holder may choose to acquire ownership. This differs from the first rule in that the holder in these situations knows that he or she is not the owner (whereas the possessor under rule 1 must believe that ownership is held). For example, Craig lends a painting to Deborah in 2020. In 2070, if Deborah is unable, using reasonable diligence, to make contact with Craig (or his successors) she can elect to become the owner of the painting.

Although this rule is of general application, it is intended to be of particular benefit to museums and galleries. It stems from a number of representations that the Commission received from this sector during the consultation period and back in the 1970s when the Commission first looked at the area. These highlighted a regular problem – a legacy of days when record-keeping was less advanced – of having items within collections in respect of which the owner was untraceable. Under the current law museums and galleries can never become owner of such property. This causes problems in terms of allocation of funds towards looking after the items, because museums often will keep items which they would rather dispose of, for fear of action by the original owner (if he or she should ever appear). This is clearly not in the public interest as it prevents museums effectively managing their collections and adding new items. The proposed rule would allow museums to become owner (provided that its requirements are met) and deal with the items in a way which is in the public interest.

The rule, however, provides for a number of protections for the owner of the lent/deposited property to ensure that he or she is not unfairly or unknowingly deprived of title to the property. First, fifty years is a fairly lengthy period of time. Secondly, the owner can stop the clock from running at any time during the period by simply making contact with the holder. A simple letter or email will suffice. Thirdly, the holder must use reasonable diligence to attempt to contact the owner before electing to acquire ownership. Once again the level required would differ depending on the value of the item in question. Finally, the Commission

also recommends that commencement of the legislation would be delayed for a period of three years after Royal Assent. There was a similar delay before the 1973 Act was commenced. This will provide owners with an opportunity to put their affairs in order and assert any claims to title. (The three year delay will apply to the Bill as a whole and thus also help owners who may be vulnerable to losing title under rule 1. This is important because possession or custody which has begun before the legislation comes into force will count if it is ongoing at that date.)

Abandoned property

A further innovation recommended by the Commission relates to corporeal moveable property which has been abandoned by its previous owner. As previously noted, the existing law is that abandoned property automatically falls to the Crown under the common law rule *quod nullius est fit domini regis*. The Commission considered that, in most cases, the operation of this rule was unsatisfactory. For example, the Crown will not be interested in discarded crisp packets or old cupboards. Similarly, if someone stumbles across an old sofa which has clearly been abandoned why should the law stop this person taking the sofa and making use of it?

The Commission recommends that corporeal moveable property which is abandoned should no longer automatically fall to the Crown but become ownerless instead. The effect of this recommendation would be to restrict the operation of the *quod nullius est fit domini regis* rule and allow a finder of abandoned corporeal moveable property to appropriate it. This change would bring Scots law into line with most other European jurisdictions. The recommendation is, however, subject to an important qualification. The finder of lost or abandoned corporeal moveable property must first report it to the police and comply with the reporting regime set out in section 67 of the Civic Government (Scotland) Act 1982 before he or she can gain title to the property. This is a safeguard to ensure that thieves do not try to argue that property which they have stolen was actually abandoned.

Treasure trove

An important consideration for the Commission during the project was the recognition of Crown rights of ownership. These were in principle outwith the project's scope and the Commission had to consider in particular how to protect the Crown's right to treasure trove i.e. portable antiquities of importance to the nation. Having recommended a new twenty-year

rule of positive prescription, the Commission proposes that ownership of corporeal moveables should no longer negatively prescribe under section 8 of the 1973 Act. In association with the rule *quod nullius est fit domini regis* rule, section 8 is one of the ways in which the Crown can currently assert title to treasure trove. Another is the current rule for abandoned property which, as has been mentioned, the Commission also recommends changing. To protect the Crown's right to treasure trove in the light of these proposed changes, the Commission recommends a new sixty-year non-possessory rule of positive prescription in the Crown's favour. This would mean that where corporeal moveable property has not been possessed by anyone for sixty years it will fall to the Crown. It is a rule aimed at future treasure trove. Current treasure trove, which is already the Crown's because of the current rules on abandonment and negative prescription coupled with the rule *quod nullius est fit domini Regis*, will remain the Crown's.

A further protection is also recommended in relation to treasure trove. Rules 1 and 2 set out above will not apply to such property. Thus, for example, such property will not become owned by a possessor after twenty years even although possessed in good faith and without negligence.

Intellectual property

The Commission has one other recommendation, relating to intellectual property rather than corporeal moveables. In *Fisher v Brooker* [2009] UKHL 41 Lord Hope of Craighead raised the issue of whether the general rules of negative prescription in the 1973 Act could apply to copyright, patents etc notwithstanding that these have clear periods under their own statutes. The English limitation legislation expressly provides that it does not apply whether other enactments provide for their own periods. There is no equivalent provision in the 1973 Act. The Commission regards this as unsatisfactory and proposes that there should be such a provision. Intellectual property, however, is a reserved matter and thus Westminster legislation would be required to effect such a change.

Conclusion

Scots law currently suffers from a lack of coherent rules in relation to prescription and title to corporeal moveable property. The Commission's recommendations, if implemented, would address this. The area is not an easy one in policy terms as there is a need to balance a number of competing interests, including certainty of title for possessors, rights of ownership for

owners, the national importance of cultural property and the Crown's right to certain types of property (particularly treasure trove). Naturally there may be different views on what appropriate time periods should be. The Scottish Ministers and ultimately the Scottish Parliament will have to consider what any final legislation should say. It is the Commission's clear view, however, that the current law is unsatisfactory and that legislation is needed.

[The authors formed the Scottish Law Commission team responsible for the Report.]